United States Court of Appeals

for the Second Circuit

APPENDIX

76-7420

United States Court of Appeals

FOR THE SECOND CIRCUIT

SOLOMON CATES, *et al.*,

Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC., *et al.*,

Defendants-Appellees.

CIVIL ACTION No. 73 Civ. 5487 (CLB)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

NATHANIEL R. JONES
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PAGINATION AS IN ORIGINAL COPY

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[CAPTION]

AMENDED COMPLAINT

Filed: March 4, 1974

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343; 42 U.S.C. §2000e et seq. and 28 U.S.C. §§2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. §1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 45 U.S.C. §151 and §§181 and 182 based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

2. This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of: (a) discriminating against plaintiffs and other black employees and applicants

for employment in the positions of pilot and flight engineer because of their race or color with respect to compensation, terms, conditions and privileges of employment, (b) limiting, segregating and classifying employees of defendant Trans World Airlines, Inc. (TWA) who are members of the defendant Airline Pilots Association (ALPA) or who would be members of ALPA but for the practices complained of herein in equal employment opportunities and otherwise adversely affecting their status as employees because of race and color and (c) defendants ALPA failing to fairly represent plaintiffs and the class they represent.

3. Plaintiffs bring this action on their own behalf and on behalf of all other black persons who may be employed with the defendant TWA in the position of flight engineer, co-pilot, pilot, or captain or who may be presently on furlough from such positions, or who would be employed in such positions but for the defendant TWA's discriminatory employment policies and practices. Plaintiffs bring this action pursuant to Rule 23, F.R. Civ. P. The class which plaintiffs represent have been, are at the present time, and will continue to be adversely affected by the practices and policies complained of herein. There are common questions of law and fact affecting the rights of the members of this class who are continuing to be limited, classified

and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affected their status as employees because of race or color. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. The defendants have acted or refused to act on ground generally applicable to the class.

4. Plaintiff Solomon Cates is a black citizen of the United States and a resident of the State of New Jersey who initially applied for a flight crew position on February 28, 1966, at which time he was fully qualified for the position sought. Subsequently, plaintiff Cates applied repeatedly for the same position and on each said occasion he was rejected because of his race. Finally, on October 17, 1969, he was hired by the defendant as a flight engineer. On September 1, 1970, plaintiff Cates was furloughed and has not been recalled by or worked for defendant TWA since that date. On March 24, 1972, plaintiff Cates filed charges with the United States Equal Employment Opportunity Commission against the defendants herein, which charges were amended on June 1, 1972. On November 27, 1973, plaintiff Cates received his amended Notice of Right to Sue from the Equal Employment Opportunity Commission.

5. Plaintiff Jonathan George is a black citizen of the United States and is a resident of the State of New York. Plaintiff George initially applied for the position of a flight crew member with the defendant TWA on February 28, 1966, at which time he was rejected for hire on the basis of his race, despite his being fully qualified for the position sought at that time. Finally, plaintiff George was hired for the position of flight engineer on August 1, 1969. On October 5, 1970, plaintiff George was discriminatorily furloughed and since that time has not been recalled to work. Plaintiff George filed charges with the United States Employment Opportunity Commission on March 24, 1972, against the defendants herein, which charges were amended on June 1, 1972. On November 28, 1973, plaintiff George received an amended Notice of Right to Sue from the Equal Employment Opportunity Commission.

6. Plaintiff James Whitehead, Jr., is a black citizen of the United States and is a resident of the State of New Jersey. Plaintiff Whitehead was employed as a pilot in the U. S. Air Force from September, 1957 through May, 1967. He desired employment in a flight position with defendant TWA in or about 1957 and thereafter, at which times he was fully qualified for such a position. However, because of known discriminatory hiring practices of TWA, plaintiff

Whitehead was dissuaded from applying. Plaintiff Whitehead was subsequently accepted for employment with TWA in a flight position on March 28, 1966, and began performing duties in that position on May 5, 1967. He has been in the regular employ of the defendant TWA since that time. Plaintiff Whitehead filed charges against the defendants with the Equal Employment Opportunity Commission on March 24, 1972, which charges were amended on June 1, 1972. On November 28, 1973, plaintiff Whitehead received an amended Notice of Right To Sue from the Equal Employment Opportunity Commission.

7. Defendant TWA is an international and domestic airline doing business in the United States and in the State of New York. The Company operates and maintains an airline organization and is an employer within the meaning of 42 U.S.C. §2000e et seq. in that Company is engaged in an inquiry affecting commerce and employs at least twenty-five persons.

8. Defendant ALPA is an unincorporated labor organization doing business in the State of New York within the meaning of 42 U.S.C. §2000e et seq. in that ALPA is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay,

hours, and other tersm and conditions of employment with flight engineers and pilots employed by the Company. ALPA has at least twenty-five members.

9. The defendants have in the past and continue to maintain employment policies and practices which adversely affect the employment rights and opportunities of black employees and prospective employees for the positions of flight engineer, co-pilot, pilot and Captain on account of their race. These discriminatory policies and practices include but are not limited to the following:

(a) All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been, at all times material to this action, governed and controlled by collective bargaining agreements (hereinafter referred to as "agreements" entered into between ALPA and TWA.) Under and pursuant to the terms of such agreements, the defendants have established a promotional and seniority system, the effect of which has been and continues to be limit, segregate and classify and discriminate against black employees at TWA's facilities in ways which jeopardize the jobs of and tend to deprive the said black employees of employment opportunities and otherwise adversely affect their status as employees because of their race and color.

The seniority system referred to above is not necessary to the operation of the defendant TWA's business.

(b) TWA has consistently failed and refused to hire qualified black individuals as crew members on the basis of their race.

(c) TWA has failed and refused to take affirmative steps to rectify the effects of its past discriminatory hiring policies. On information and belief, TWA has failed and refused to hire any additional black flight engineers or pilots since 1969 and currently employs only approximately 14 black employees in such positions of a total of approximately 4,468 employees in those positions.

(d) The defendants have applied criteria for advancement and promotion within its flight deck positions which discriminate against its black employees. Seniority based upon date of hire controls, at least in part, promotions from flight engineer to co-pilot to pilot. Failure to hire black crew members on the basis of race has placed them in an inferior position so that the application of this criteria has a disparate impact upon black employees and is not related to job performance.

(e) The defendants have applied criteria for job retention during periods of reduction in force which discriminate against black flight deck employees in the

positions of flight engineer and pilot. These criteria result in a disparate impact upon TWA's black employees and are not related to job performance.

(f) On information and belief, defendant TWA has retaliated against, taken reprisal against and otherwise adversely affected the employment status of employees who have filed charges with the Equal Employment Opportunity Commission, such retaliation being violative of 42 U.S.C. §2000e-3(a).

(g) Opportunity for advancement to the position of Captain is denied plaintiffs and the class they represent on the basis of their race. On information and belief defendant TWA does not now have and never has had a black Captain as a result of its discriminatory practice of exclusion on the basis of race.

(h) The defendant TWA fails and refuses to recruit employees for flight deck crew positions in a manner which provides equal employment opportunities for blacks. On information and belief, TWA's primary recruiting resource is the armed forces of the United States. Since the armed forces have rarely trained and employed black pilots, concentrating recruitment activity in the armed forces results in diminished employment opportunities for qualified and qualifiable black pilots.

(i) Defendant ALPA has failed and refused to fairly represent plaintiffs and the class they represent.

10. The policies complained of in Paragraph 9 above violate the rights of the plaintiffs and the class they represent secured by 42 U.S.C. §§1981 and 2000e et seq.

Prayer for Relief

11. WHEREFORE, the plaintiffs, for the reasons set forth above and having no effective and adequate remedy at law, hereby respectfully request that the Court enter judgment granting plaintiffs and the class which they represent:

(a) A declaratory judgment that the defendants' acts, policies and practices complained of herein violate plaintiffs' rights secured by 42 U.S.C. §§1981 and 2000e et seq.,

(b) A preliminary and permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs to enjoy equal employment

opportunities as secured by 42 U.S.C. §§1981 and 2000e et seq.,

(c) A preliminary and permanent injunction enjoining each of the practices described in Paragraph 9, above, and requiring the defendants to take affirmative steps to redress the continuing effects of such practices,

(d) All backpay to which the plaintiffs and members of their class may be entitled,

(e) Plaintiffs' costs and reasonable attorneys' fees, and

(f) Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

_____

[CAPTION]

MEMORANDUM AND ORDER

Entered: October 1, 1974

Brieant, J.

Plaintiffs allege on behalf of themselves and others similarly situated, that defendants have discriminated and continue to discriminate against black employees and applicants for employment because of their race, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et. seq.), and the Civil Rights Act of 1866 (42 U.S.C. §1981). They seek a declaratory judgment and a preliminary and permanent injunction restraining defendants from continuing such discrimination. Plaintiffs claim that defendant Airline Pilots Association ("ALPA") has also violated the duty of fair representation imposed upon it by the Railway Labor Act (45 U.S.C. §§151, 181, 182) by participating or acquiescing in the discriminatory acts charged.

Defendant Trans World Airlines, Inc. ("TWA") is an international and domestic airline, and is an employer within the meaning of 42 U.S.C. §2000e, et seq. Defendant ALPA is a labor organization within the meaning of 42 U.S.C. §2000e, et seq. and 45 U.S.C. §151. This Court

has subject matter jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5 (f)(3).

Defendants have each moved to dismiss the complaint pursuant to Rule 12(b)1 and 6, F.R.Civ.P. on the ground that both the Civil Rights claim and the Title VII claim are untimely. Plaintiffs' motion for class determination has been deferred pending decision of defendants' motion to dismiss, and we intimate no opinion herein as to whether class action treatment would be appropriate.

The complaint alleges that TWA has had a history of various discriminatory practices existing at least as long ago as 1957, at which time plaintiff Whitehead claims he was interested in and qualified for a position as pilot with TWA but did not apply, knowing he would be rejected because of his race. There is no allegation in the complaint that plaintiff Whitehead ever applied and was rejected during the period from May 1957 to March 28, 1966, the date he was accepted by TWA. He began working with TWA on May 5, 1967, and is now employed by the company as a pilot.

Plaintiff Cates claims that he applied for a flight position with TWA and, although qualified, was rejected repeatedly because of his race during the period February 28, 1966 through October 17, 1969, when he was hired.

On September 1, 1970, plaintiff Cates was furloughed as part of a reduction in force, and has not worked for TWA since, although he is subject to recall according to seniority.

Plaintiff George claims that he applied to TWA for a position as a flight crew member on February 28, 1966, and although qualified, was rejected because of his race. On October 1, 1969, he was hired as a flight engineer, furloughed on October 5, 1970 and, like Cates, has not worked for TWA since then.

Each of the plaintiffs filed charges against the defendants with the United States Equal Employment Opportunity Commission ("EEOC") on March 24, 1972, which charges were amended on June 1, 1972. Plaintiff Cates received a notice of Right to Sue from the EEOC on November 27, 1973, and plaintiffs George and Whitehead received such notices on November 28, 1973. The Complaint herein was filed on December 23, 1973, within the 90 days required by 42 U.S.C. §2000e-5(f)[1] and was amended on March 4, 1974.

Plaintiffs' charges were filed with the EEOC on the day the 1972 amendments to Title VII became effective and the new time limits therein are applicable to this action.[2]

Defendants contend that although suit was filed

within the time required by Title VII, the action must be dismissed because the underlying charges were not. The statute [42 U.S.C. §2000e-5(e)] provides that "[a] charge under this section shall be filed [with the EEOC] within one hundred eighty days after the alleged unlawful employment practice occurred...." The filing of a timely charge with the EEOC is a jurisdictional prerequisite to a private suit under Title VII. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F.Supp. 305 (S.D.N.Y. 1972).

A complaint against an employer alleging racial discrimination may not be dismissed solely on the ground that filing was not timely as to an isolated event, where the suit challenges the maintenance of an allegedly discriminatory system. Such a violation is continuing in nature:

> "We agree with defendant that, ordinarily, refusal to hire is not a continuing violation. Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972). However, where, as here, the complaining party alleges that the refusal of employment results from an ongoing pattern and practice of discrimination and seeks to represent the entire class of persons allegedly discriminated against, his or her individual grievance provides merely the springboard from which to investigate the employer's alleged continuing violation with respect to the class as a whole. The refusal to hire,

> which is isolated as to the individual, forms one item in an ongoing series of violations with respect to the class, the many elements of which are linked by their common source - employer discrimination." Kohn v. Royal, Kcegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973)

See also, Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F.Supp 305 (S.D.N.Y. 1972) (filing of sex discrimination charge after filing period is not a bar to suit when a continuing practice of discrimination is challenged rather than a single discriminatory act); Sciaraffa v. Oxford Paper Co., 310 F.Supp. 891 (S.D.Me. 1970) (typical layoff is not a continuing event, but if there is continuing violation, lapse of filing period does not bar suit); 4 ALRFed. 833.

If plaintiffs have pleaded and can support at trial, a claim that a continuing pattern of racial discrimination exists at TWA, as distinguished from one or more isolated individual discriminatory acts directed solely against these plaintiffs, the suit is not time barred.

Defendants urge that since TWA has not hired anyone since January 1970, there can be no continuing pattern of discrimination. No evidentiary affidavits have been submitted, and this fact is not before the Court except in defendant TWA's brief. It is irrelevant

in any event. Two of the plaintiffs have been furloughed, not fired. Their recall is possible if the prospects of the airline industry improve. Plaintiff Whitehead is still in TWA's employ. He has an obvious interest in promotion and other benefits which his pleading asserts is being thwarted by racial bias.

Defendants read the complaint as allegi[illegible]first, individual instances of refusal to hire qualified black persons, which according to defendants, necessarily last occurred upon the date of hiring of the last-hired plaintiff (plaintiff Cates, October 17, 1969). Second, plaintiffs assert that applicatio[illegible] to them of TWA's date-of-hire seniority system, which is part of its collective bargaining agreement with ALPA, operates in a discriminatory fashion. Had plaintiffs been hired earlier, they would have all the benefits flowing from having greater seniority, including later furlough during a force reductio[illegible]. As to this claim, defendants contend that the last application of the date-of-hire seniority system occurred automatically upon the hiring of plaintiff Cates in 1969, and the charges filed almost two and a half years later were untimely.

In the alternative, defendants argue, assuming the time is measured from the last furlough alleged in the

complaint (plaintiff George on October 5, 1970), charges were not filed for a year and a half, and also were untimely. See Waters v. Wisconsin Steel Workers, _____ F.2d _____ (7th Cir. Aug. 26, 1974).

A reading of its plain words compels the rejection of such a narrow construction of the complaint as to limit the matters in issue to the lawfulness of the seniority list. For the purposes of this motion, defendants concede the truth of all well-pleaded material allegations of the complaint, and the complaint may not be dismissed unless it is certain plaintiffs can prove no state of facts upon which relief could be granted. See Haines v. Kernar, 404 U.S. 519 (1972); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971).

In addition to the claims of discriminatory refusal to hire and application of the seniority system to the individual plaintiffs, the complaint, on its face, clearly alleges a pervasive pattern of racial discrimination which continues to date. Plaintiffs allege that TWA employs a token number of blacks. Of the approximately 4,468 flight crew members employed by TWA, only 14 are black. Discrimination in promotion is alleged to be part of the pattern. No black person has ever been employed as a Captain and few blacks are pilots. Reprisals against

black employees who file charges with the EEOC are alleged to have occurred. We cannot say on that which is before us plaintiffs will be unable to prove any of these allegations, and accordingly are entitled to no relief whatever. The complaint is sufficient on its face to make out a claim of a continuing violation. Accordingly, plaintiffs must have their day in Court. This conclusion is in keeping with the Supreme Court s statement in Love v. Pullman Co., 404 U.S. 522, 527 (1972) that:

> " [t] echnicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

With regard to the cause of action based on 42 U.S.C. §1981, it is untimely unless the statute of limitations is tolled by the filing of the EEOC charges.

No statute of limitations is provided for §1981. The federal courts must, therefore, look to the most analogous state statute. [United Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)]. In New York, that statute is CPLR §214(2) ("an action to recover upon a liability created or imposed by statute"), which provides for a three-year period within which to bring an action. See Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Assuming, as defendants are willing to do, that the last act from which the statute could run was the furlough

of plaintiff George, October 5, 1970, the statute would have run on October 5, 1973, more than two months before suit was commenced. However, we hold that timely filing of an EEOC charge tolls the statute of limitations applicable to §1981. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, (D.C. Cir. 1973); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Ripp v. Dobb Houses, Inc., 366 F.Supp. 205 (N.D. Ala. 1973); Guerra v. Manchester Terminal Corp., 350 F.Supp 529 (S.D. Tex. 1972); Henderson v. Trust National Bank of Montgomery, 344 F.Supp. 1373 (M.D. Ala. 1972). Contra: Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973); Jenkins v. General Motors Corp., 354 F.Supp. 1040 (D. Del. 1973). The Supreme Court has granted certiorari in Johnson, supra, to consider this issue [42 U.S.L.W. 3661 (June 4, 1974)].

Such a result must be reached in recognition of the

> "salutary policy of encouraging plaintiffs to utilize administrative remedies [Citation omitted]. This principle extends to encouraging a party to utilize whatever remedies are available to him with the Equal Employment Opportunity Commission." Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205, 214 (N.D. Ala. 1973).

If plaintiffs are engaged simultaneously in prosecuting a premature action in federal court, the EEOC's attempts to conciliate certainly will not be aided. Nor

should plaintiffs be forced to choose between losing the benefits of conciliation, or giving up the right to sue. Defendants are not prejudiced because they have received notice of plaintiffs' claimed discrimination through the administrative proceeding.

Defendants' motions are in all respects denied.

So Ordered.

Dated: New York, New York
September 30, 1974

CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E S

1. 42 U.S.C. §2000e-5(f)(1) provides in pertinent part

> "If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or ... the Commission has not entered into a conciliation agreement to which the person aggrieved and within ninety days after the giving of such notice, a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved...."

2. Section 14 of Pub. L.92-261 provides:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 [42 U.S.C. §2000e, et. seq.] shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter."

[CAPTION]

STIPULATION AND ORDER

Filed: December 9, 1975

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for plaintiffs and defendant Trans World Airlines, Inc. ("TWA") that, in consideration of the letter agreement between plaintiffs and defendant TWA annexed hereto, plaintiffs shall move this Court by motion on or before October 14, 1975, for permission to file an amended complaint which shall omit claims of current discrimination and of retaliation by defendant TWA against black pilots; shall claim that application to them of the seniority system incorporated in the TWA-ALPA collective bargaining agreement perpetuates past alleged discrimination and constitutes a violation of Title VII.

IT IS FURTHER AGREED that no later than three (3) weeks following the filing of the said amended complaint, if permission to file the same is granted, defendant TWA will move to dismiss the amended complaint on the grounds that (a) the Statute of Limitations bars all of the claims alleged in the amended complaint and (b) the

amended complaint does not state a cause of action because a bona fide seniority system operating on a "last-in, first-out" basis does not violate Title VII by perpetuating the effects of past discrimination.

Dated: New York, New York
October 9, 1975

POLETTI, FREIDIN, PRASHKER,
FELDMAN & GARTNER

By_____
A Member of the Firm
Attorneys for Defendant TWA
777 Third Avenue
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JAMES I. MEYERSON, ESQ.

By_____
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1790 Broadway - 10th Floor
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(212) 245-2100

SO ORDERED, THIS _____ DAY OF December, 1975, after hearing counsel,

_____
U. S. D. J.

[CAPTION]

LETTER OF AGREEMENT

Filed: December 9, 1975

The primary focus of the litigation as initially filed regards furloughs and the effect of the seniority system upon Black pilots of TWA. In accordance with the suggestion of the Court and in an effort to expedite a determination of this central issue which will benefit both parties hereto and the class subsumed therein, certain ancillary issues will be disposed of as follows:

1. TWA shall remove from the personnel file of black pilot A. L. Story a letter from Captain A. J. Clay, dated September 15, 1973, and one from Captain E. L. Strickland, dated September 27, 1973, both of which criticize Mr. Story's conduct on trips on which he flew as part of their flight crew.

2. TWA shall offer black pilot Bennie Clay priority consideration for the first available opening in a Flight Instructor or Check Engineer position at any domicile in which Mr. Clay expresses an interest.

3. TWA shall send a written notice to each black pilot on its seniority list that training and check airman positions, when available, are open in an entirely non-discriminatory manner to all pilots who express an interest in such positions and meet proficiency related qualifications for the positions sought.

4. TWA shall make every reasonable effort to find an appropriate non-flying TWA position in the San Francisco area for which black pilot James

Lee, currently on furlough, is qualified and to offer such position to Mr. Lee.

5. Plaintiffs shall, on or before the date fixed in the stipulation to which this letter will be attached, move the Court for leave to file an amended complaint herein, which amended complaint (a) shall omit any allegations of current discrimination by TWA against plaintiffs or the alleged plaintiff class (including allegations of retaliation for complaints filed with the Equal Employment Opportunity Commission) and shall include that prior alleged discrimination is perpetuated by the seniority provisions of TWA's collective bargaining agreement with ALPA in violation of Title VII of the Civil Rights Act.

6. After the said amended complaint has been filed, TWA shall, within the time fixed in the stipulation to which this letter will be attached, move to dismiss the amended complaint on the grounds (a) that the claims stated therein are barred by the appropriate statute of limitations applicable thereto and (b) that the amended complaint fails to state a cause upon the principle of "last-in, first-out" does not perpetuate past discrimination.

October 9, 1975

WILLIAM D. WELLS, ESQ.
BARBARA A. MORRIS, ESQ.
JAMES A. MEYERSON, ESQ.

By _____

Attorneys for Plaintiffs

POLETTI, FREIDIN, PRASHKER,
FELDMAN & GARTNER

By _____
A Member of the Firm
Attorneys for Defendant TWA

[CAPTION]

SECOND AMENDED COMPLAINT

Filed: December 15, 1975

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343; 42 U.S.C. §2000e et. seq. and 28 U.S.C. §§2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. §1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 45 U.S.C. §151 and §§181 and 182 based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

2. This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom, or usage of discriminating against

plaintiffs and other black employees and applicants for employment in the positions of pilot and flight engineer because of their race or color by failing to hire them because of their race or color and by applying to those hired the provisions of the current seniority system with all the consequences thereof all as specifically set forth in paragraphs 4, 5, 6, 9 and 10, below.

3. Plaintiffs bring this action on their own behalf and on behalf of all other black persons who may be employed with the defendant TWA in the position of flight engineer, co-pilot, pilot, or captain or why may be presently on furlough from such positions, or who would be employed in such positions but for the defendant TWA's discriminatory employment policies and practices. Plaintiffs bring this action pursuant to Rule 23, F.R. Civ. P. The class which plaintiffs represent have been, are at the present time, and will continue to be adversely affected by the practices and policies complained of herein. There are common questions of law and fact affecting the rights of the members of this class who are continuing to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race and color. These persons are so numerous that joinder of

all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. The defendants have acted or refused to act on grounds generally applicable to the class.

4. Plaintiff Solomon Cates is a black citizen of the United States and a resident of the State of New Jersey who initially applied for a flight crew position on February 28, 1966, at which time he was fully qualified for the position sought. Subsequently, plaintiff Cates applied repeatedly for the same position and on each said occasion he was rejected because of his race. Finally, on October 17, 1969, he was hired by the defendant as a flight engineer. On September 1, 1970, plaintiff Cates was furloughed and has not been recalled by or worked for defendant TWA since that date. On March 24, 1972, plaintiff Cates filed charges with the United States Equal Employment Opportunity Commission against the defendants herein, which charges were amended on June 1, 1972. On November 27, 1973, plaintiff Cates received his amended Notice of Right to Sue from the Equal Employment Opportunity Commission.

5. Plaintiff Jonathan George is a black citizen of the United States and is a resident of the State of New York. Plaintiff George initially applied for the position of a flight crew member with the defendant TWA on February 28, 1966, at which time he was rejected for hire on the

basis of his race, despite his being fully qualified for the position sought at that time. Finally, plaintiff George was hired for the position of flight engineer on August 1, 1969. On October 5, 1970, plaintiff George was criminatorily furloughed and since that time has not been recalled to work. Plaintiff George filed charges with the United States Employment Opportunity Commission on March 24, 1972, against the defendants herein, which charges were amended on June 1, 1972. On November 28, 1973 plaintiff George received an amended Notice of Right to Sue from the Equal Employment Opportunity Commission.

6. Plaintiff James Whitehead, Jr., is a black citizen of the United States and is a resident of the State of New Jersey. Plaintiff Whitehead was employed as a pilot in the U. S. Air Force from September, 1957 through May, 1967. He desired employment in a flight position with defendant TWA in or about 1957 and thereafter, at which times he was fully qualified for such a position. However, because of the known discriminatory hiring practices of TWA, plaintiff Whitehead was dissuaded from applying. Plaintiff Whitehead was subsequently accepted for employment with TWA in a flight position on March 28, 1966, and began performing duties in that position on May 5, 1967. He has been in the regular employ of the defendant TWA since that time. Plaintiff Whitehead filed charges against the

defendants with the Equal Employment Opportunity Commission on March 24, 1972, which charges were amended on June 1, 1972. On November 28, 1973, plaintiff Whitehead received an amended Notice of Right To Sue from the Equal Employment Opportunity Commission.

7. Defendant TWA is an international and domestic airline doing business in the United States and in the State of New York. The Company operates and maintains an airline organization and is an employer within the meaning of 42 U.S.C. §2000e et seq. in that Company is engaged in an industry affecting commerce and employs at least twenty-five persons.

8. Defendant ALPA is an unincorporated labor organization doing business in the State of New York within the meaning of 42 U.S.C. §2000e et seq. in that ALPA is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms and conditions of employment with flight engineers and pilots employed by the Company. ALPA has at least twenty-five members.

9. The defendants have maintained in the past and continue to maintain policies and practices which adversely affect the employment rights and opportunities of black employees and prospective employees for the positions of

flight engineer, co-pilot and Captain on account of their race. These policies and practices are described as follows:

a. Since it began doing business the defendant TWA has failed and refused to hire qualified black individuals as flight deck personnel on the basis of their race.

b. TWA has failed and refused to take affirmative steps to rectify the effects of its past discriminatory hiring policies. On information and belief, TWA has hired no black flight deck crew members since 1969. Currently, TWA has in its active employ or on furlough only 14 black deck crew members of a total of approximately 4,468 employees in such positions.

c. All matters regarding compensation, terms, conditions and privileges of employment, promotion from flight engineer to higher-rated flight positions including the position of Captain, assignment to flight duty, nature of flight status, and selection for furlough are controlled by the employees' seniority rights as set forth in the collective bargaining agreements entered into between TWA and ALPA, as well as by all such agreements, interpretation and other formal understandings which are supplemental thereto. Pursuant to the terms of such agreements, the defendants have established a seniority system under which employees begin to accrue seniority rights on or about their date

of permanent employment. Promotion, furlough, and all other employment decisions described herein are made on the basis of seniority.

d. All of TWA's black flight crew members have been hired since July 2, 1965; many of these were not hired at the time of their initial application on account of their race despite their having been fully qualified at that time. All of TWA's black flight deck personnel have been and are currently adversely affected by denial of promotion and by furlough as a result of the seniority system described herein. As a result of the seniority system, no black pilot has ever held the position of Captain, and a significantly disproportionate percentage of the black flight deck personnel have been and currently are on furlough status. Failure to hire and delay in hiring black flight deck personnel on the basis of race has placed them in an inferior position to their white co-workers and has resulted in a disparate impact upon these black employees by reason of the application of the seniority system.

e. The seniority system described herein is not necessary to the safe and efficient operation of the businesses of the defendants TWA and ALPA, nor is it job related in any manner. Alternative methods of making employment decisions are available to the defendants;

these methods are equally effective in allowing necessary employment decisions to be made but would have a lesser adverse impact on black flight deck personnel.

f. On information and belief, it is alleged that as an economy measure TWA has as of January 1970 temporarily suspended all hiring for flight deck positions.

g. By negotiating, approving and entering into the collective bargaining agreements described above, and by failing and refusing to seek modification of those agreements in order to lessen or remove the adverse impact which the seniority system contained in those agreements has upon black flight deck personnel employed by TWA, defendants TWA and ALPA have denied to these individuals equal employment opportunities. Moreover, by reason of these same facts the defendants TWA and ALPA have failed in their duty of fair representation to plaintiffs and the class they represent.

10. The policies complained of in Paragraph 9, above, violate the rights of the plaintiffs and the class they represent secured by 42 U.S.C. §§1981 and 2000e et seq., and by 45 U.S.C. §§151, 181 and 182.

Prayer for Relief

11. WHEREFORE, the plaintiffs, for the reasons set forth above and having no effective and adequate remedy

at law, hereby respectfully request that the Court enter judgment granting plaintiffs and the class which they represent:

a. A declaratory judgment that the defendants' acts, policies and practices complained of herein violate plaintiffs' rights secured by 42 U.S.C. §§1981 and 2000e et seq.,

b. A preliminary and permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs to enjoy equal employment opportunities as secured by 42 U.S.C §§1981 and 2000e et seq.,

c. A preliminary and permanent injunction enjoining each of the practices described in Paragraph 9, above, and requiring the defendants to take affirmative steps to redress the continuing effect of such practices,

d. All backpay to which the plaintiffs and members of their class may be entitled,

e. Plaintiffs' costs and reasonable attorneys' fees, and

f. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

[CAPTION]

MEMORANDUM AND ORDER

Filed: July 22, 1976

Brieant, J.

In their second amended complaint, plaintiffs on behalf of themselves and all others similarly situated allege that the defendants have discriminated on the basis of race against them by refusing, initially, to hire Black persons for flight deck crew positions, and by applying to those few who were hired after initial discriminatory treatment, the provisions of a date-of-hire seniority system which makes them more susceptible to layoffs.[1/]

Defendant Trans World Airlines, Inc. ("TWA"), a domestic and international airline, is an employer within the meaning of 42 U.S.C. §2000e(b). Defendant Airline Pilots Association ("the Union" or "ALPA") is a labor organization within the meaning of 42 U.S.C. §2000e (d) and a representative within the meaning of 45 U.S.C. §151.

Plaintiffs claim these practices violate their right to equal employment opportunity under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. et seq.

("the Title VII claim"), and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981 ("the §1981 claim").

Plaintiffs also assert that the defendant ALPA violated the duty of fair representation which it owed to plaintiffs and the class which plaintiffs seek to represent, 45 U.S.C. §§152, 181, 182 ("the fair representation claim"). Plaintiffs seek a declaratory judgment vindicating their rights, awarding retroactive pay, and granting a permanent injunction which will prevent the defendants from interfering with their right to equal employment opportunities and require them to take affirmative steps to redress the continuing effect of the above-described improper prior practices.

The defendants have now moved to dismiss the second amended complaint on the ground that the Title VII claim and the §1981 claim are both time-barred. TWA also asserts that its seniority policies pursuant to which two of the plaintiffs were laid-off in 1970, constitute a bona fide seniority system under 42 U.S.C. §2000e-2(h), and that therefore these layoffs were not an unlawful employment practice under Title VII.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1337, 1343 and 42 U.S.C. §2000e-5(f) (e).

Prior Proceedings

Familiarity with our Memorandum Decision dated

September 30, 1974 in this action (8 CCH Empl. Prac. Dec. ¶9755) is assumed. There, anticipating the doctrine of Egelston v. State University College at Geneseo, et al., ____ F.2d _____ (2nd Cir. June 7, 1976, Dkt. 76-7047), we held that the factual allegations in the first amended complaint, read together with generalized allegations of continued other racial discrimination, well pleaded, prevented dismissal. The presence of allegations of a continuing pattern of racial discrimination at TWA, comprised in the prior pleading, and distinguished from one or more isolated individual discriminatory acts directed solely against these plaintiffs, suggested then that the suit was not time-barred.

After a number of informal pre-trial discussions between counsel for the parties, and with the Court, the parties agreed by formal stipulation and order, filed December 9, 1975, among other things, that (1) plaintiff would file an amended complaint omitting claims of current discrimination and of retaliation by defendant TWA against Black pilots, raising solely the issues arising out of the seniority system incorporated in the TWA-ALPA collective bargaining agreement, and (2) the defendant, following the filing of such an amended complaint, would move to dismiss. This has been done. The parties hoped thereby to avoid the delay and expense attached to lengthy

pre-trial discovery and preparation, and the costs and burdens of a plenary trial. The parties and the Court regard the issues presently remaining in this litigation as presenting solely an issue of law.

In connection with the aforesaid stipulation, filed December 9, 1975, the parties entered into a letter of agreement which intended to resolve by settlement all of the other or current job related difficulties perceived by plaintiffs. Following this resolution of these other disputes it was agreed that a motion to dismiss the second amended complaint would be heard on the merits, and this has been done. In addition to oral argument, the Court has had and considered the briefs and submissions of the parties.

Factual Background

The factual allegations underlying the second amended complaint, which this Court must regard as true in its consideration of the motions to dismiss are as follows: All three of the named plaintiffs are Black. Solomon Cates claims that he applied for a flight deck crew position with TWA for the first time on February 28, 1966. He asserts that although qualified, he was repeatedly rejected because of his race, until October 17, 1969, when he was

finally hired. On September 1, 1970, he was furloughed as part of a general reduction in force. He has not worked for TWA since, although he is subject to recall according to his date-of-hire seniority position.

Plaintiff Jonathan George also claims that he first applied to TWA for a flight deck crew position on February 28, 1966. Although he was then qualified, TWA rejected him because he was Black. However, on October 1, 1969, after many subsequent applications, George was finally hired as a flight engineer. He was then furloughed on October 5, 1970, as part of the same retrenchment program that affected Cates. He has not worked for TWA since that time, although he is also eligible for recall should economic conditions improve.

The third and final named plaintiff is James Whitehead, Jr. He asserts that he was interested in working for TWA as far back as 1957. Although he believed at that time that he was qualified for employment as a flight deck crew member, he did not actually apply because he knew of TWA's discriminatory policy of rejecting Blacks for such positions because of race. Instead, Whitehead stayed in the Air Force and did not actually apply to TWA until nine years later. On March 28, 1966 he was accepted for employment by TWA, and he began working on May 5, 1967. In contrast to Cates and George, Whitehead has never been

furloughed or laid-off and at the present time he is employed by TWA as a pilot. He is more likely to be furloughed than would be the case if he had nine years additional seniority which he would have had, in the event that he had applied and been hired nine years earlier. He seeks constructive seniority from a constructive date of hire some nine years prior to his actual employment by TWA.

Each plaintiff filed charges against the defendants with the United States Equal Employment Opportunity Commission ("EEOC") on March 24, 1972. These charges were later amended on June 1, 1972. Cates received his Notice of the Right to Sue from the EEOC on November 27, 1973, and plaintiffs George and Whitehead received their notices one day later. The original complaint in this action was filed on December 23, 1973, within the ninety days required by 42 U.S.C. §2000e-5(f)(1).

That complaint was amended for the first time on March 4, 1974. On September 30, 1974 by a Memorandum Decision previously referred to, this Court denied defendant's motion to dismiss the amended complaint, holding in effect that (1) the Title VII actions were not untimely since they alleged continuing violations of Title VII; and (2) the filing of a charge with the EEOC tolls the statute of limitations as to the §1981 claims.

Two significant developments since that decision have

led the defendants to renew their objections that at least the Title VII and the §1981 claims are time-barred. The first such development was the Supreme Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), which held, contra to this Court's prior ruling, that the filing of a charge of employment discrimination with the EEOC does not toll the running of the separate statute of limitations which is applicable to an action brought under 42 U.S.C. §1981. The second and perhaps more significant subsequent development was the series of negotiations and discussions leading to the Stipulation and Letter of Agreement and in the filing of the second amended complaint, all discussed supra, p. 4.

Defendant TWA, along with ALPA which was not a party to the aforementioned Stipulation and Letter of Agreement, have now reasserted their basic position that these plaintiffs are barred from bringing a private action under Title VII because their charges of discrimination were not timely filed with the EEOC. As a separate ground for dismissal TWA contends that its seniority system qualified as bona fide, under Section 703(h) of Title VII and that plaintiffs have therefore failed to state a claim upon which relief may be granted. Finally, in light of Johnson v. Railway Express Agency, Inc., supra, defendants have renewed their contention that the §1981 claims must be

dismissed as untimely.

The Title VII Claims

It has generally been held that the filing of a timely charge with the EEOC is a jurisdictional prerequisite to a private action under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 986 (D. C. Cir. 1973); but see EEOC v. Nicholson File Co., 408 F.Supp. 229 (D. Conn. 1976). The statute itself provides that, "...[a] charge under this section shall be filed [with the EEOC] within one hundred eighty days after the alleged unlawful employment practice occurred..." 42 U.S.C. §2000e-5(e).[2/]

It is undisputed that the plaintiffs first filed charges with the EEOC on March 24, 1972. Thus to resolve the statute of limitations issue with respect the Title VII claim, it is only necessary to resolve two questions: (1) What unlawful employment practices are alleged in the Second Amended Complaint? (2) Did these alleged practices occur during the 180 day period prior to March 24, 1972?

Reading the Second Amended Complaint together with the Stipulation and Letter of Agreement, it is clear that plaintiffs are basically alleging two distinct unlawful employment practices: (1) a refusal to hire plaintiffs and the class they seek to represent because of race

("the refusal to hire claim") and (2) the application of a facially neutral, date-of-hire seniority system to all flight deck crew members, including plaintiffs and all other similarly situated Black flight deck crew members, which, by making Blacks more exposed to layoffs than whites, has the effect of carrying forward TWA's past discriminatory hiring practices, now abandoned, into the present ("the seniority claim").

The Refusal to Hire Claim

With regard to the refusal to hire claim, this Court concludes that as to all plaintiffs and the class they seek to represent, the unlawful employment practices occurred well before the 180 day period ending on March 24, 1972. Insofar as concerns Mr. Cates, he was actually hired by TWA on October 17, 1969. While he alleges that from February 28, 1966 on, he repeatedly reapplied for a job with TWA, reading the complaint in the light most favorable to the plaintiffs, the last day on which an unlawful refusal to hire could have occurred with respect to Mr. Cates was October 16, 1969, the day before he was actually hired. As for Mr. George, the last possible day was July 31, 1969, the day preceding TWA's acceptance of his application for employment. Mr. Whitehead was accepted for employment on March 28, 1966. Although it is not clear that he was ever actually rejected for employment, there could not have been

a refusal to hire him after March 27, 1966. Finally, as to the purported class which plaintiffs seek to represent, the Second Amended Complaint alleges that in January 1970, TWA as an economy measure suspended all hiring for flight deck positions. Thus there could not have been any unlawful refusals to hire on the basis of race after that date.

Therefore, since all of the dates when TWA unlawfully refused to hire plaintiffs and members of the class because of race are well outside the 180 day period ending March 24, 1972, the date of the filing of charges with the EEOC, the Title VII refusal to hire claims are time-barred.

Plaintiffs seek to avoid this result by asserting that the refusal to hire is a continuing violation of Title VII which tolls the running of the 180 day statutory period. It is generally held that a refusal to hire is a single discriminatory act, and does not continue until the company changes its policies: Molybdenum Corp. v. EEOC, 457 F.2d 935 (10th Cir. 1972). Plaintiffs point to the exception to this general rule which has been suggested at the district court level where a current pattern and practice of discrimination is alleged and "...[t]he refusal to hire, which is isolated as to the individual, forms one item in an ongoing series of violations with respect to the class, ..." Kohn v. Royal, Koegel & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

Whatever the validity or applicability of this doctrine of a continuing violation in a proper case, here there could not have been any continuing refusals to hire as to the named plaintiffs after the last of them was hired. Nor could there have been an ongoing series of such violations with respect to the class after TWA suspended all hiring for economic reasons in January 1970, a suspension which has never been lifted. Since no charges were filed with the EEOC within 180 days after these unlawful employment practices occurred, that portion of the Second Amended Complaint which alleges an unlawful refusal to hire plaintiffs and the members of the class must be dismissed.

The Seniority Claim

Layoffs pursuant to a reduction in force even when carried out according to a facially neutral, date-of-hire seniority system may be an unlawful employment practice as defined by Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), if an individual can show that but for past discrimination he or she would have been hired early enough to accumulate sufficient seniority to withstand the layoffs. Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Franks v. Bowman Transportation Co., 44 L.W. 4356 (March 24, 1976). Under the doctrine of the Acha and Franks cases, at least Cates and George have stated a valid "last-hired,

first-fired" claim, since they have alleged facts which, if proven, would lead to a conclusion that TWA's discriminatory hiring practices prevented them from accumulating sufficient seniority to withstand the 1970 layoffs. Other employees who began work after Cates' and George's initial application in 1966 have not been laid-off and continue to work for TWA. Whitehead himself falls into this latter category, since he did not apply until March 1966 and did not begin working until May 1967. It should be noted here that Whitehead's claim is not a last-hired, first-fired complaint; the essential element in his allegations is that because of TWA's well-known discriminatory policies which dissuaded him from applying he lost other seniority benefits such as an earlier chance at promotion, a choice of flight routes, type of equipment flown, and scheduling priorities.

Yet while all plaintiffs have alleged that the operation of TWA's seniority system violates Title VII, Cates and George in having been laid-off and Whitehead in having lost other seniority-related benefits,[3/] the novel questions facing this Court on these motions to dismiss are at what point in time these alleged violations occurred and whether or not the violations continued up until 180 days before the filing of charges with the EEOC.

Considering first when the alleged violations occurred, defendants argue that each plaintiff was aggrieved

as to the seniority system on his individual date-of-hire, because it was at that time that he was awarded his place on the seniority roster, and that each subsequent denial of seniority benefits stemmed from this initial placement. Thus, since charges were not filed with the EEOC within 180 days of the time plaintiffs were hired, the defendants assert that the seniority claims are now untimely. Plaintiffs, on the other hand, contend that the seniority claims accrue at no particular point in time, but, because the operation of the seniority system has the effect of carrying forward TWA's past discrimination up until the present time, the Title VII violations are continuing in nature. To support their contention they point to the fact that Cates and George have never been recalled to duty with TWA, while other men who would have less seniority but for TWA's discriminatory policies (i.e., those hired after February 1966 and before August 1969) have been rehired. Plaintiffs would have this Court rule that their seniority claims constitute allegations of a continuing violation of Title VII.

The Court declines to adopt either of these positions. Plaintiffs' claims that the grievance arises at the date of hire would create a truly burdensome caseload for the EEOC by opening the floodgates to premature challenges to facially neutral, date-of-hire seniority systems. In

order to preserve his right to challenge such a system before the EEOC, and subsequently in a private suit in a federal district court, every employee would have to file his charge within 180 days after he was assigned his place on the seniority roster. Those who believe that their risk of being laid-off is s[illegible]what heightened by a low seniority status which in turn is somehow traceable to past discrimination, would be driven to deluge the EEOC with charges of a potential unlawful employment practice, at a time when there is no assurance that any actual layoff or other discrimination will ever occur. Nor would such a rule promote clarity in the proceedings before the Commission, since in framing his charges, the individual would not be able to describe precisely what the company had done to him. We cannot believe that Congress intended the EEOC, which is required by law to investigate the grievances brought before it, to follow the wasteful procedure of conducting frivolous investigations into premature charges of past discrimination, as to which loss or damage is merely potential.

In support of their contention plaintiffs cite the many cases which have held that discriminatory layoffs and recalls are continuing violations of Title VII, and have the effect of tolling the statutory period, e.g., Cox v. United Gypsum Co., 409 F.2d 289 (7th Cir. 1969);

Bartmess v. Drewrys U.S.A. Inc., 444 F2d 118[illegible] Cir. 1971) cert. denied, 404 U.S. 939 (1971); ack. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Sciaraffa v. Oxford Paper Co., 310 F.Supp. 891 (D.Me. 1970); Tippett v. Liggett & Meyers Tobacco Co., 316 F.Supp. 292 (M.D.N.C. 1970); Burwell v. Eastern Airlines, Inc., 394 F. Supp. 1361 (E.D.Va. 1975). Yet none of these cases involved the application of a facially neutral seniority system, which merely carries forward the effects of a now-discontinued policy of past discrimination. Macklin, Bartmess and Burwell all involved discriminatory policies (exclusion of Blacks from over-the-road driving, requiring women to retire earlier than men, treating pregnant women differently), which policies were being actively pursued up until the time charges were filed with the EEOC. In Cox, supra, there were allegations that certain recalls had discriminated against women by giving preference to men with less seniority and were thus not made pursuant to a facially neutral seniority system. In Sciaraffa, supra, 896, the Court found a continuing violation in plaintiff's inability to regain employment, but there plaintiff had been improperly deprived of employment initially by a layoff which was discriminatory on its face.

By its language alone, the holding in Tippett would appear to be broad enough to encompass this case.

There the company had at one time segregated job departments by sex and had kept separate seniority lists for men and women. Due to a reduction in the work force, the plaintiffs, a group of experienced female workers, were laid-off in July 1965, because they were the low individuals on the segregated seniority lists, although men with less seniority in other departments who performed within plaintiffs' capabilities were retained. The policy of segregating men and women by departments and the maintenance of separate seniority lists were subsequently discontinued, but when plaintiffs were eventually recalled, they were placed at the bottom of the new consolidated list, and given no credit for their prior employment. The court found this denial to be a continuing violation and held, in language that plaintiffs herein now seek to rely on:

> "This is not the case of a layoff with nothing more. It is a case of prior discrimination reaching effectively into the present." Tippett, supra, 296.

However, a careful analysis of the facts in Tippett distinguishes it from the case at bar. There the original layoff was, standing by itself, an unlawful employment practice having resulted from the discriminatory policies of segregating the sexes by department and maintaining

separate seniority lists. The plaintiffs therein were aggrieved by departmentally-segregated seniority lists which, on their face, unlawfully discriminated on the basis of sex. It was this type of prior discrimination which the court found to reach into the present as a continuing violation. In contrast, plaintiffs here do not challenge the underlying principle of a date-of-hire seniority system. Their only complaint is that, as applied to them, the system operates in a manner that perpetuates the effects of a now-discontinued policy of discriminatory hiring. Plaintiffs in fact do not seek to overturn TWA's entire seniority system as discriminatory, but only to gain their rightful place within that system, by an award of constructive seniority, that is to be placed in the seniority position which they would have occupied but for unlawful discrimination in the past. See Chance v. The Board of Examiners, Nos. 75-7161, 75-7164 (2d Cir. Jan. 19, 1976) as modified on rehearing.

In this regard the Supreme Court's recent opinion in Franks v. Bowman Transportation Company, 44 U.S.L.W. 4356 (March 24, 1976) is instructive. The distinction pointed out by Mr. Justice Brennan in that case helps to clarify the issues here and leads to the conclusion that none of the authorities cited by plaintiffs are controlling. In describing the issue before it, the Court stated id.

at 4359:

> "The underlying legal wrong affecting [the Black applicants] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire."

Also, strong policy reasons dictate against holding that an employer who, at some remote time in the past, discriminated on the basis of race or sex, and now applies a neutral seniority system to all employees is guilty of committing a continuing violation of Title VII.

It is widely recognized that an administrative agency like the EEOC with limited resources should only be required to investigate fresh discriminatory acts. Hecht v. Cooperative for American Relief Everywhere, 351 F.Supp. 305, 310 (S.D.N.Y. 1972), quoted with approval in Kohn v. Royal, Koegel & Wells, 59 F.R.D. 5.5, 518 (S.D.N.Y. 1973). To the extent that it will always bring past violations forward into the present, the continuing violation doctrine impairs this basic policy. Applied in the context of a seniority system, it may well lead to an inefficient use of scarce administrative and judicial resources.

Also, holding that the mere operation of a neutral

seniority system in itself continues some past violation into the present would effectively eradicate the limitations period contained in the statute for anyone who claims that he was hired at a later point in time than he should have been. The more junior employees are disadvantaged in a relative sense, daily and continuously, by a date-of-hire seniority system. Carried to its logical result, such an evasion of the statutory limitations of time would permit those whose only claim is they were hired later than they should have been, to bring their claims to the EEOC anytime they chose, while those who were refused hire altogether would still face the bar of the statutory cut-off date.

Thus, neither of the parties has offered the Court an acceptable solution to the novel question of when an unlawful employment practice occurs, in the context of a constructive seniority claim. The Court concludes that the correct answer is to be found by focusing on the alleged unlawful practice itself, and its impact on the individual employee. However, because there was a different impact on Cates and George on the one hand and Whitehead on the other hand, it will be helpful to consider their claims separately.

Cates' and George's last-hired, first-fired claim

The Court concludes that with regard to a last-hired,

first-fired layoff, the date from which the 180 day period to file charges with the EEOC commences to run is the date of layoff. A recent appellate case involving airline stewardesses supports the conclusion stated above. In Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975), the Ninth Circuit held that a stewardess who had been discriminatorily discharged pursuant to a now-discontinued no-marriage policy had failed to make a timely filing with the EEOC where she did not act for more than three and one-half years after her layoff. The Court stated:

> "We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful employment practice is itself a violation of the Act. Under the Statute, it is the alleged unlawful act or practice--not merely its effects--which must have occurred with the [statutory period]." Id. at 596.

See also Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 44 U.S.L.W. 3670 (May 24, 1976); but see contra, Evans v. United Air Lines, Inc., 11 CCH Empl. Prac. Dec. ¶10, 865 (7th Cir., en banc, April 16, 1976).

Neither United Air Lines case presents facts identical with those here, which involve layoffs made due to a reduction in force, and carried out solely via TWA's facially neutral, date-of-hire seniority system.

Collins and Evans, supra, involved layoffs pursuant to United's admittedly discriminatory practice of terminating those stewardesses who married.

Policy reasons for choosing the date of layoff are clear. It has the advantage of certainty for the EEOC and the courts, each of which is charged with the administration and enforcement of Title VII. Also, while it is arguable that even after the layoff a date-of-hire seniority system continues to operate to the detriment of more junior employees such as Cates and George (especially where, as here, recalls are in order of seniority), it cannot be doubted that the layoff is the one event which brings matters to a head. It is the definitive point in time when the adverse impact of a low seniority status is most severe, and the affected employee feels most aggrieved. In addition from the standpoint of the individual who has actually lost his job, the layoff presents him with a clearcut break with the past, something in the nature of a fait accompli. Normally, it is at this point that the employee who thinks that he or she has been treated unfairly will feel compelled to take action. From such date forward, it is not unreasonable to demand that a victim of past date-of-hire discrimination take steps to protect his or her rights. Cf. Acha v. Beame, supra.

One final policy reason requires mention. An award of constructive seniority, to which plaintiffs may be

entitled if they prove their claims, affects the rights of other workers. If plaintiffs are successful, some of these workers, i.e., all those hired between the date plaintiffs' class members would have been hired but for the discrimination and the date they actually were hired, will be displaced in the seniority lists. Some will lose their jobs. If this Court holds that a violation of the nature alleged by plaintiffs is continuing in nature, then aggrieved persons such as plaintiffs would be free to bring a suit for constructive seniority at any time. However, setting the date of layoff as the triggering point for the commencement of the 180 day limitations period will promote the prompt adjudication of the rights of all workers, including those workers who will necessarily be affected adversely by an award of constructive seniority to others. All employees have an interest in knowing precisely where they stand on the seniority roster, because seniority benefits are worthless unless secure. An evaluation of his relative seniority is an important factor in the daily life of a worker. It controls his daily decisions whether to stay, or change jobs, and whether to conform to the norms of the work or risk discharge and loss of seniority. For these reasons then, and others, those who seek to rearrange the seniority lists should be encouraged to bring their actions promptly,

in order to resolve the difficult issue of constructive seniority in an expeditious manner.

Considering then the date of layoff as the commencement of the 180 day period in which to file charges with the EEOC, it is clear that both Cates and George are now time-barred from bringing this challenge to the operation of the seniority system. Cates' layoff occurred on September 1, 1970, and George's furlough followed soon after on October 5, 1970. Since they did not file charges with the EEOC until March 24, 1972, well after 180 days (or even three hundred days, see footnote 2) had expired, they have not satisfied the jurisdictional requisite for a private action under Title VII. This portion of their complaint must therefore be dismissed.

Whitehead's Claimed Loss of Seniority Benefits

As was mentioned, Whitehead does not have a last-hired, first-fired claim, since he has never been laid-off. His situation is thus slightly more complex and no single date stands out from which to commence the running of the statutory period. However, the Court need not reach that precise issue, in view of its conclusion below, that Whitehead has not stated a timely claim upon which relief can be granted.

The substance of Whitehead's complaint is that he

lost seniority benefits because TWA's discriminatory hiring policies dissuaded him from applying for a flight crew position for almost nine years. Yet when he did finally apply in 1966, he was hired almost immediately. Although he began working only in 1967, he was able to accumulate enough seniority to avoid the layoffs which affected Cates and George. Whitehead's claim thus comes down to a loss of the many other seniority benefits such as promotion, choice of flight duty, route assignments, and equipment flown.

As previously noted, supra, p. 9, Whitehead's claim that TWA refused to hire him is time-barred. He is now seeking a declaratory judgment that the seniority system is unlawful and an award of constructive seniority for the nine year period during which TWA's hiring policies dissuaded him from even applying for a position. Whether or not he is entitled to such an award depends first upon whether he has stated a valid and timely claim against TWA in the Second Amended Complaint. Acha v. Beame, supra, provides Whitehead no help. There the Court of Appeals held that laid-off women police officers have a cause of action under Title VII, if they can show that but for sex discrimination at some prior point in time by the employer, they would have been hired early enough to accumulate sufficient seniority to withstand that layoff. Whitehead, however, has never been laid-off. Thus, unlike

Cates and George, he has no valid claim under the Second Circuit's holding in Acha, which this Court reads as being limited to an actual layoff which is traceable to a last-hired, first-fired policy.[4/]

Were we to read Acha expansively and hold that the mere denial of seniority benefits which would have been earned but for the prior discrimination is a violation of Title VII, this would not help Whitehead overcome the timeliness problem. As the facts stated in the Second Amended Complaint make clear, Whitehead's only surviving claim is that TWA's pre-1966 refusal to hire Black persons dissuaded him from applying early enough to accumulate sufficient seniority with the result that since his employment actually commenced in 1967, he has been deprived of chances for promotion, choice of flight scheduling, route assignment, and type of equipment flown. While Whitehead has not alleged that he was denied some benefit traceable to his low seniority status within 180 days of the filing of charges with the EEOC, the Court will construe his complaint so as to make such an allegation. Still, this does not help him state a timely claim for relief. The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations

period in which to file charges. Any detriments which he may have suffered during this period are not in and of themselves fresh acts of discrimination, but are only the derivative effects of the prior policies as carried forward by the seniority system. As a case like Collins makes clear, it is the unlawful act or practice and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC.

As the Supreme Court recognized in an analogous context in the Bowman case, Whitehead's real grievance is that due to TWA's discriminatory hiring policies he was not hired as early as he might have been. But on and 180 days after July 2, 1965, the effective date of Title VII, he could have challenged those policies by filing charges with the EEOC. He failed to do so, and since he has never been laid-off, he cannot now seek to litigate these same issues via a private action demanding constructive seniority. Therefore, like his co-plaintiffs, Cates and George, Whitehead's Title VII claim must be dismissed.

The §1981 Claims

In its Memorandum and Order of September 30, 1974, the Court ruled that plaintiffs' §1981 claims were controlled by the three year limitations period applicable to all actions brought in New York "...to recover upon a

liability created or imposed by statute" (N.Y.C.P.L.R. §214(2). The Court also held that the three year period was tolled by the filing of charges of unlawful employment practice with the EEOC.

However, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court ruled that the filing of such a charge with the EEOC does not toll the running of the statute of limitations on a §1981 claim. In light of Johnson, this Court will withdraw its previous ruling in this case and now concludes that since the original complaint was not filed until more than three years after the §1981 cause of action accrued, that portion of the complaint which sets forth claims under §1981 of Title 42 must be dismissed as time-barred.

The Breach of the Duty of Fair Representation

The fair representation claim is asserted by all of the plaintiffs against both TWA and ALPA. The substance of the charge here is that by negotiating, approving and entering into a series of collective bargaining agreements, and by failing to seek modification of the date-of-hire seniority system so as to lessen its adverse impact upon Black persons, the defendants have breached the duty of fair representation which they owed to plaintiffs and the other members of the class.

The first difficulty with this claim is that only the union owes this duty of fair representation to the employees. The duty arises from the fact that under the Labor Management Relations Act of 1947, 29 U.S.C §151 et. seq., the union is the exclusive collective bargaining agent of all employees in the unit. The Supreme Court has held that the same statutory authority which gives the union the power to represent all individuals in the unit must by necessity include a concurrent obligation to serve the interests of all, without hostility or discrimination towards any person or group within the unit. Vaca v. Sipes, 386 U.S. 171 (1967). TWA does not owe any such duty in the first instance to its employees. That portion of the complaint which alleges that TWA breached a duty of fair representation does not state a claim upon which relief can be granted. Glus v. G.C. Murphy Co., 329 F.Supp. 563 (W.D.Pa. 1971).

Plaintiffs seek to avoid this result by pointing to cases such as Glover v. St. Louis-San Francisco Ry., 393 U.S. 324 (1969) and O'Mara v. Erie Lackawanna R.R., 407 F.2d 674 (2d Cir. 1969), aff'd, sub. nom., Czosek v. O'Mara, 397 U.S. 25 (1970), which in certain situations allow the employer to be joined with the union in a suit against the latter for breach of the duty of fair representation. These cases, however, are of no help to the

plaintiffs here in light of this Court's dismissal, infra, of the fair representation claim against ALPA as well.

The defect in the Second Amended Complaint is not a lack of specificity; the facts underlying the fair representation claim against ALPA are clearly set forth, and fail to state a claim.

Plaintiffs do not claim that ALPA played any role in TWA's claimed long-standing prior refusal to hire qualified Blacks for flight deck crew positions. The only complaint against ALPA is that it breached the duty of fair representation by negotiating, approving, and entering into a series of collective bargaining agreements and by failing to seek modification of those agreements in order to remove the adverse impact of seniority upon Black flight deck personnel. Significantly, there are no allegations that ALPA acted in an arbitrary or discriminatory fashion, or that it was guilty of bad faith. Vaca v. Sipes, supra, 190. Nor is there any contention that ALPA engaged in any hostile discrimination against plaintiffs or other minority group members by, for example, refusing to process their grievances. Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944). And finally, plaintiffs do not seriously contend that the seniority system on its face sets up arbitrary or irrational classifications among employees

as was the case in Jones v. Trans World Airlines, Inc. 495 F.2d 790 (2d Cir. 1974). In this regard, it should be noted that plaintiffs do not seek to overturn the entire seniority system, but only to gain what they consider to be their rightful places in it.

Even when read in the light most favorable to plaintiffs, their fair representation claims against ALPA show the kind of conduct which the Supreme Court has repeatedly held does not constitute a breach of the duty of fair representation. In Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), which also involved a dispute over seniority, the Supreme Court stated:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statotory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

See also Jackson v. Trans World Airlines, Inc., 457 F.2d 202 (2d Cir. 1972) (no breach of the duty of fair representation merely because the negotiated agreement fails to satisfy all persons represented by the union).

The heart of plaintiffs' grievances against ALPA

is not that the union engaged in some affirmative act or practice which harmed them, but rather that the union failed to take the initiative in urging changes in the seniority system. This Court realizes, as it must, that the difficult problems raised by the sensitive issue of constructive seniority make it likely that there will be profound differences of opinion on that subject among the various union members. In selecting a facially neutral, date-of-hire seniority system as a rational method for allocating benefits among its members, it cannot be doubted that ALPA acted entirely within the permissible range of reasonableness.

And finally, if after timely demand ALPA made no effort to negotiate with TWA for an award of constructive seniority as a remedy for the prior discrimination against plaintiffs, such conduct is not in and of itself supportive of a claim of hostility, arbitrariness, or bad faith on the part of the union. It should be remembered that the question of whether constructive seniority may even be awarded as a remedy for proven violations of Title VII has been a contoversial issue in the courts, resolved only by the Supreme Court's recent opinion in Franks v. Bowman Transportation Company, 44 U.S.L.W. 4356 (March 24, 1976). Unions such as ALPA do not breach their duty of fair representation to minority group members merely by continuing in effect a date-of-hire seniority system.

Conclusion

The Second Amended Complaint must therefore be dismissed in its entirety. No purpose will be served by allowing a further amendment.

Defendants' motions to dismiss are granted.

So Ordered.

Dated: New York, New York
July 22, 1976

CHARLES L. BRIEANT
U. S. D. J.

FOOTNOTES

1. By agreement of the parties approved by the Court, no disposition has been made of plaintiffs' request that the litigation proceed as a class action. In view of the determination of this motion, it is unnecessary to determine whether the prerequisites of Rule 23, F.R.Civ.P. have been satisfied.

2. The 180 day period is extended to 300 days in cases where "... the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice..." 42 U.S.C. §2000e-5(e). Since there is no allegation in the Second Amended Complaint that charges were filed with the New York State Division of Human Rights or any other State or local agency, the 180 day period is applicable here. Prior to March 24, 1972, the effective date of the 1972 Amendment to Title VII, an aggrieved person had only 90 days in which to file a charge with the EEOC directly and 210 days if he had first complained to a State or local agency.

3. Whitehead has alleged that although he was never laid-off, he has a valid Title VII claim for lost seniority benefits. In considering this motion to

to dismiss, the Court need not reach the substantive issue of whether, in the absence of a layoff, such a cause of action actually exists in Whitehead's favor. See, e.g., Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975), where the Court of Appeals avoided deciding whether the complaint stated a claim under the Civil Rights Act, but remanded the case to this court with instructions to determine whether the statute of limitations barred plaintiff from proceeding with his claim for damages.

4. This Court's conclusion that Acha v. Beame is limited to the layoff (or last-hired, first-fired) situation is strongly supported by the reliance which that opinion placed on a recent Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975). The crucial passage in Judge Feinberg's opinion, tracks very closely the commentator's statement at p. 1556 that:

> "Last hired, first fired layoffs discriminate against those employees who would have been hired earlier and thus would have acquired sufficient seniority to withstand layoff absent the discrimination in the past."

Neither the Court of Appeals nor the Harvard Note was dealing with the much more complex question of whether the operation of a facially neutral seniority system violates Title VII where it has the effect of denying

a later-hired individual seniority related benefits which he would have earned but for the discrimination but does not result in his being laid-off. This Court does not reach that question in view of its holding that even if such a cause of action existed, it would be time-barred. See Note 2.